

# STATE OF DELAWARE THE COURTS OF THE JUSTICES OF THE PEACE 820 NORTH FRENCH STREET, 11TH FLOOR WILMINGTON, DELAWARE 19801

NORMAN A. BARRON CHIEF MAGISTRATE TELEPHONE: (302) 571 - 6001

### LEGAL MEMORANDUM 88-172

TO: AL

ALL JUSTICES OF THE PEACE

STATE OF DELAWARE

FROM:

NORMAN A. BARRON

CHIEF MAGISTRA

DATE:

JULY 19, 1988

RE:

RECOVERY OF ATTORNEY'S FEES

In Legal Memorandum 82-82 (2nd Supplement), dated July 7, 1988, Garageman's Liens, brief reference was made regarding the recovery of attorney's fees in actions at law. I quote from Elcorta, Inc. and Ciotti v. Summit Aviation, Inc., Del.Super., Civil Action No. 86A-MY-11, opinion and order by J. Balick dated June 24, 1988, cited in said Legal Memorandum:

"It is true that the statute provides that '[a]ny fees shall be recoverable as a cost by the lienholder if a sale is conducted.' 25 <u>Del.C.</u>, §3903(f). However, the settled rule in Delaware is that attorneys' fees may not be recovered unless expressly provided by statute. <u>Casson v. Nationwide Insurance Co.</u>, Del.Super., 455 A.2d 361 (1982); cf. 6 <u>Del.C.</u>, §9-504. It was therefore error to allow Summit to deduct attorneys' fees from the proceeds of the sale."

It is appropriate to analyze the issue in greater detail since there is, in fact, a second mechanism for allowing the recovery of attorney's fees besides the statutory authorization, to wit: A valid contractual agreement entered into between the parties which agreement makes specific provision to the awarding of attorney's fees in case of default by the buyer covering the costs of collection. In <u>Casson</u>, <u>supra</u>, the Court stated:

"In Delaware, it is well-settled that ordinary court costs are usually allowed to a prevailing party. Walsh v. Hotel Corp. of America, Del.Supr., 231 A.2d 458 (1967); Super.Ct.C.R. 54(d); 10 Del.C., \$5101. But allowance of counsel fees as part of the costs is the exception to the general rule. Walsh, supra; U.S. Industries, Inc. v. Gregg, D.Del. 457 F.Supp. 1293 (1978) aff'd. 605 F.2d 1199 (1979); cert.den., 444 U.S. 1076, 100 S.Ct. 1023, 62 L.Ed.2d 758 (1980). As our Supreme Court has noted, '[W]isely our courts have been very cautious in approving exceptions to that general rule.' Walsh, supra at 462.

The plaintiff's argument relies on a number of cases where courts sitting as mixed courts of law and equity have exercised equitable jurisdiction to award attorney's fees under extreme factual circumstances. . . . In Delaware also it has been long recognized that a court of equity has jurisdiction to award counsel fees as part of costs in a proper case. Wilmington Medical Center v. Severns, Del.Supr., 433 A.2d 1047 (1981); Maurer, surpa; Mencher v. Sachs, 39 Del.Ch. 366, 164 A.2d 320 (1960); Wilmington Trust Co. v. Coulter, Del.Ch. 208 A.2d 677 (1965); Everitt v. Everitt, 37 Del.Ch. 512, 146 A.2d 388 (1958).

The foundation for this historic practice of granting reimbursement for the costs of litigation other than conventional taxable costs is part of the original authority of the Chancellor to do equity. Maurer, supra. This rule has been codified in 10 Del.C., \$5106 which provides that '[t]he Court of Chancery shall make such orders concerning costs in every case as is agreeable to equity.' This statutory reference to costs has been interpreted to include counsel fees where equity requires. Wilmington Trust Co., supra.

Apart from authorization in statute or contract, equity is the only basis for awarding attorney's fees to a successful party against another party or fund. Plaintiff's request that this Court exercise equitable jurisdiction is misdirected. If attorney's fees are to be awarded an insured in successful actions in law against an insurer, the entitlement must be legislatively established. Indeed such authority is conferred in 18 Del.C., §4102 with regard to claims under

property insurance contracts. A similar provision in either Chapter 39 of that Title, 'Casualty Insurance Contracts' or in the Delaware 'No-Fault' provisions, is conspicious by its absence.

In an action at law, a court may not order the payment of attorney's fees as part of costs to be paid by the losing party unless the payment of such fees is authorized by some provision of statute or contract. Honaker v. Farmers Mutual Insurance Co., Del.Super., 313 A.2d 900 (1973); J.J. White, Inc. v. Metropolitan Merchandise Mart, supra; Great American Indemnity Co. v. State, 32 Del.Ch. 562, 88 A.2d 426 (1952); Maurer v. International Re-Insurance Corp., 33 Del.Ch. 456, 95 A.2d 827 (1953).

The plaintiff does not invoke a contractual provision, but insists that authority for granting attorney's fees is present in the Delaware Insurance Code. In particular, plaintiff argues that Nationwide's conduct in respect to his claim amounts to an unfair claims settlement practice as defined in 18 Del.C., \$2304(16); that such conduct constitutes a deceptive trade practice and, therefore, assessment of attorney's fees against the defendant is permitted under 6 Del.C., §2533(b). This argument is without merit. Under §2304(16), to constitute an unfair settlement practice, the proscribed conduct must be performed 'with such frequency as to indicate a general business practice.' Even if plaintiff's allegations are accepted, there has been no claim concerning the frequency of such conduct. Furthermore, plaintiff has made no allegation of fact which would bring Nationwide's conduct within the statutory definition of deceptive trade practices contained in 6 Del.C., §2532. In short, there is no statutory basis for an award of attorney's fees in this case.

The plaintiff further claims that an award of attorney's fees is appropriate here because of alleged bad faith conduct exhibited by Nationwide. As previously discussed, the finding of a reasonable justification for Nationwide's action in terminating plaintiff's benefits precludes, as a matter of law, a finding of bad faith, wanton or oppressive conduct. Even if it were otherwise, absent contractual or statutory authority, counsel fees could not be awarded in this case."

As was stated in <u>Honaker v. Farmers Mutual Ins. Co.</u>, <u>supra</u>:

"In an action at law, attorneys' fees will not be awarded unless clearly provided for by statute or contract."

### Honaker, súpra at 904.

The most common contractual agreement for the award of attorney's fees in case of court action involves the typical installment contract regarding the purchase of goods. These contracts typically provide for the assessment of attorney's fees in case the seller has to go to court to recover the purchase price. If the contract is executed by the buyer, the provision should be honored in any debt action brought in Magistrate Court in which the seller prevails.

The next question which must be addressed is what amount of attorney's fees should be awarded when the statute or contract is silent as to the amount thereof. This issue was addressed in the case of <u>Great American Indemnity Co. v. State</u>, <u>supra</u>, where the Court stated:

"It is the general rule that when attorneys' fees are allowed as part of the costs of litigation, and the amount of such fees is not fixed either by statute or by agreement of the parties, the amount of the fees allowed shall be fixed according to the reasonable worth of the attorneys' services, taking into consideration such elements as the standing of the attorney at the bar, the means of the client, the nature and importance of the cause, the time and labor expended on behalf of the client, the amount involved in the litigation, the amount finally recovered, and whether or not the compensation of the attorneys was to be wholly contingent upon success. 14 Am.Jur., Costs, §77; 20 C.J.S., Costs, §218.e.; and see Annotation, 9 A.L.R. 237."

NAB:pn

The Honorable Andrew D. Christie
The Honorable William T. Allen
The Honorable Albert J. Stiftel
The Honorable Robert H. Wahl
The Honorable Robert D. Thompson
The Honorable Alfred R. Fraczkowski
The Honorable Charles M. Oberly, III
Lawrence M. Sullivan, Esquire
Eugene M. Hall, Esquire
Arthur G. Connolly, Jr., Esq., Pres., DE Bar Association
Michael E. McLaughlin, J. P. Court Administrator
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File (L172)



# STATE OF DELAWARE JUSTICE OF THE PEACE COURTS

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CHIEF MAGISTRATE

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## **LEGAL MEMORANDUM 88-172 (SUPPLEMENT)**

TO:

ALL JUSTICES OF THE PEACE

ALL JUSTICE OF THE PEACE CIVIL COURTS

FROM:

PĂTŘÍCIA W. GRIFFÍN

**CHIEF MAGISTRATE** 

RE:

ATTORNEYS' FEES AND COLLECTION COSTS

DATE:

**FEBRUARY 9, 1998** 

Legal Memorandum 88-172, Recovery of Attorney's Fees, Barron, C.M. (July 19, 1988) advised that attorneys' fees may be recovered when they are provided for by contract as well when they are provided for by statute. With regard to awarding attorneys' fees pursuant to a contract, I would like to call your attention to the limiting provisions of 10 Del.C. § 3912. This statute states:

In all causes of action, suits, matters or proceedings brought for the enforcement of any note, bond, mechanics lien, mortgage, invoice or other instrument of writing, if the plaintiff or lien holder in the action, suit or proceeding recovers judgment in any sum, the plaintiff or lien holder may also recover reasonable counsel fees, which shall be entered as a part of the judgment in the action, suit or proceeding. Such counsel fees shall not in any such action, suit or proceeding, exceed 20 percent of the amount adjudged for principal and interest. Such counsel fees shall not be entered as a part of such judgment unless the note, bond, mortgage, invoice or other instrument of writing sued upon, by the terms thereof, expressly provides for the payment and allowance thereof, except in the cases of mechanics liens in which no express agreement shall be necessary in order to entitle the lien holder to reasonable counsel fees.

<sup>&</sup>lt;sup>1</sup> However, 25 Del.C. § 5111 provides that no provision in a rental agreement providing for the recovery of attorneys' fees by either party in any suit, action or proceeding arising from the tenancy shall be enforceable.

of the amount awarded for principal and interest. If the written instrument specifies the amount of attorneys' fees, the fee is presumed to be reasonable if it is within the statutory limit. While the reasonableness of the amount may be challenged, the defendant has the burden of rebutting the presumption of reasonableness. In so doing, the defendant is entitled to an evidentiary hearing. Rock v. Short, Del. Supr., 336 A.2d 219, 200 (1975). When put in issue, the reasonableness of the attorneys' fees is for the judgment of the Court upon the facts and circumstances proved. Id. at 221.

As discussed in *Legal Memorandum 88-172*, if the agreement provides for attorneys' fees but does not specify the amount, the Court may determine the amount of the fees awarded. As stated in *Legal Memorandum 88-172*:

It is the general rule that when attorneys' fees are allowed as part of the costs of litigation, and the amount of such fees is not fixed either by statute or by agreement of the parties, the amount of the fees allowed shall be fixed according to the reasonable worth of the attorneys' services, taking into consideration such elements as the standing of the attorney at the bar, the means of the client, the nature and importance of the cause, the time and labor expended on behalf of the client, the amount involved in the litigation, the amount finally recovered, and whether or not the compensation of the attorneys was to be wholly contingent upon success.

Legal Memorandum 88-172 at 4 quoting Great American Indemnity Co. v. State, Del. Supr., 88A.2d 426 (1952).

Of course, in setting the fees, when § 3912 is applicable,<sup>2</sup> the Court must remain within the 20 percent limitation on attorneys' fees.

Finally, it is important to remember that § 3912 requires that the instrument of writing sued upon must expressly provide for the payment of such fees. Thus, in a case to which § 3912 applies, the use of a generic term such as "collection and costs", without specifically mentioning attorneys' fees is not a sufficient basis for finding that the contract provides for such fees. Warren v. Howell, Del. Super., 1996 WL 110712, WL op. at 1, Graves, J. (Jan. 16, 1996). However, when section 3912 does not apply, the generic term "collection costs" may include attorneys' fees. See Besk Oil, Inc. v. Brown & Bigelow, Inc., Del. Super., 1988 WL 139953, WL op. at 3, Stiftel, P.J. (Dec. 16, 1988) rearg. den. Del. Super., 1989 WL 5225 (Jan. 23, 1989).

A related issue, which arises frequently in debt actions, is whether other collection costs may be awarded. Such costs may be permitted if they are specified in the contract and are reasonable since parties to a contract can agree to an amount for damages as long as the amount is reasonable in regard to the anticipated or actual harm caused by a breach. Besk Oil, Inc., 1988 WL 139953 at 3. See also 17 Am. Jur 2d § 164 which states in part:

<sup>&</sup>lt;sup>2</sup> In Besk Oil, Inc. v. Brown & Bigelow, Inc., Del. Super., 1988 WL 139953, WL op. at 3, Stiffel, P.J. (Dec. 6, 1988) rearg. den., 1989 WL 5225 (Jan. 23, 1989), it was held that the limitations of § 3912 did not apply to contracts for the sale of goods. However, in 1991, the General Assembly amended the language of section 3912 to include the word "invoice" in determining what causes of action are covered by the statute. Thus, contracts for the sale of goods and services are now covered by the statute. Andrews Miller & Assoc., Inc. v. Forest Grove, Inc., Del. Super., 1994 WL 380996, WL op. at 5, Steele, V.C. (July 1, 1994) aff'd in part, rev'd in part on other grounds, Del. Supr., 655 A. 2d 307 (1995).

Although there is considerable conflict as to the validity of a provision or stipulation in a contract, note, or other instrument, for attorneys' fees or costs of collection or legal expenses, the rule in most jurisdictions, apart from any statutory provision to the contrary, is that such a provision or stipulation is valid; it is regarded as a reasonable provision for reimbursement or indemnity to the creditor against the expenses incident to a default on the part of the debtor, which is not against public policy if an unreasonable or oppressive sum is not specified.

However, it has been held that such costs should not be considered reasonable if they include collection costs incurred after the filing of the court action when attorneys' fees are also sought. Permitting the recovery of both attorneys' fees and administrative costs in preparing for trial would amount to a windfall for the plaintiff. Andrew Miller & Assoc., Inc. v. Forest Grove, Inc., Del. Super., 1994 WL 380996, WL op. at 6, Steele, V.C. (July 1, 1994) (unpaid professional services), aff'd in part and rev'd in part on other grounds, Del. Supr., 655 A. 2d 307 (1995). In Forest Grove, the Superior Court allowed roughly 20 percent of the principal amount of the debt for administrative costs incurred prior to filing the action in addition to attorneys' fees for 20 percent of the principal and interest. Thus, when appropriate, both administrative collection costs and attorneys' fees may be awarded.

If the plaintiff, in a case covered by 10 Del.C. § 3912, seeks collection costs without specifying attorneys' fees, the plaintiff should not be permitted to recover without proof that the costs are for administrative charges other than attorneys' fees. To permit the recovery of attorneys' fees as collection costs would defeat section 3912's requirement that attorneys' fees be specifically mentioned in the written instrument. Cf. Warren v. Howell, WL op. at 1 (§ 3912 requires that attorneys' fees must be specifically mentioned and a generic term such as "collection costs" does not satisfy the requirements of the statute.)

### Procedure in Default Judgments

When the plaintiff is seeking attorneys' fees and the action for default judgment is based upon a written contract, the plaintiff must attach a copy of the contractual provision to the Affidavit in Support of Default Judgment to show that the contract specifically states that attorneys' fees may be awarded. When attorneys' fees are permitted under the contract, they should be awarded up to the amount permitted by the contract upon proof that such an amount was actually incurred (i.e., an invoice, cancelled check or receipt) as long as the amount is not unreasonable or oppressive. If the amount of the attorneys' fees is not specified, the Court should award reasonable attorneys' fees based upon the factors discussed above. When 10 Del.C. § 3912 applies no more than 20 percent of the amount awarded for principal and interest may be awarded for attorneys' fees.

When collection costs are sought based upon a written contract, the plaintiff must attach a copy of the contractual provision specifically permitting other collection costs to the Affidavit in

<sup>&</sup>lt;sup>3</sup> 6 Del.C. § 3-108 provides, with regard to commercial paper, that a sum payable is a sum certain even though it is to be paid with costs of collection or an attorney's fee or both upon default. Thus, I would infer that in any case in which the contract is for a sum certain, that fact is not changed by the inclusion of a provision for attorneys' fees or collection costs and thus, the default judgment may be handled by the Clerk. See also Alaska Rule of Civil Procedure 55 which provides that the clerk may enter a default judgment for a sum certain including costs and attorneys' fees. If there is any question concerning the amount of attorneys' fees or collection costs which may be awarded, however, the Clerk should refer the case to a judge.

Support of Default Judgment. If collection costs are provided for in the contract, they may be approved if the plaintiff provides proof showing: 1) that the collection costs sought were actually incurred; 2) that the collection costs were incurred prior to the institution of the action; and 3) if the action is covered under 10 Del.C. § 3912, that they are for administrative costs other than attorneys' fees. While no statutory limit to the amount of collection costs applies as it does, in some cases, for attorneys' fees, the amount awarded may not be unreasonable or oppressive.<sup>4</sup>

Thus, for both attorneys' fees and collection costs, the required proof, in the case of a written contract, includes a copy of the contract and proof concerning the expenses incurred consisting of either an affidavit or documents such as an invoice, cancelled check or receipt for payment. When there is no written contract, the proof of the contractual agreement to pay attorneys' fees or collection costs may be made by testimony.

If the defendant objects to the amount of the attorneys' fees or collection costs awarded in a default judgment, testimony can be heard pursuant to a motion to vacate the default judgment.

#### PWG/crm

Honorable E. Norman Veasey cc: Honorable Randy J. Holland Honorable Henry duPont Ridgely Honorable Alex J. Smalls Honorable Vincent J. Poppiti Honorable Alfred R. Fraczkowski Honorable Alicia Howard Keith R. Brady, D.A.G. All Delaware Police Agencies Alderman's Courts All Justice of the Peace Courts Thomas W. Nagle Anna A. Lewis H. John Betts Law Libraries: New Castle County, Kent County, Sussex County, Widener University School of Law Digilaw, Inc.

<sup>&</sup>lt;sup>4</sup> In Besk Oil, Inc. v. Brown & Bigelow, Inc., 1988 WL 139953, WL op. at 3, the Superior Court found that a contractual provision for a 25% collection fee on the unpaid balance covering all collection costs was fair. However, the Court appeared uncomfortable with the use of a percentage and specifically stated that its ruling extended only to the facts of that case. Thus, the Court concluded that "[i]n other cases involving commercial transactions for the sale of goods, a flat fee for collection in a contract provision might not be reasonable under the circumstances."